

SHORELINES HEARINGS
BOARD

FINAL FINDINGS
OF FACT

No. ~~135~~ TO ~~184~~

139-6-183

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

1 IN THE MATTER OF A SUBSTANTIAL)
2 DEVELOPMENT PERMIT ISSUED BY)
3 YAKIMA COUNTY TO CLIFFORD MORRIS)
4 WALTER C. BRULOTTE, et al.,)
5 Appellants,)
6 vs.)
7 YAKIMA COUNTY and CLIFFORD F.)
8 MORRIS,)
9 Respondents.)

SHB No. 137

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

9 A hearing on the request for review of the issuance of a
10 shoreline management substantial development permit was held at
11 Yakima, Washington on June 18 and 19, 1974, before Board members
12 W. A. Gissberg (presiding), Walt Woodward, Ralph Beswick and
13 Ray Card.

14 Appellants appeared by Douglas D. Peters, their attorney; respondent,
15 Yakima County (hereinafter County) by Paul D. Edmondson, a Deputy
16 Prosecuting Attorney; respondent, Clifford F. Morris, by his
17 attorney, Charles C. Flower.

18 Having heard the testimony, and having considered the exhibits and

1 the statements of the attorneys and the contentions of the parties,
2 and being fully advised, the Board makes and enters these

3 FINDINGS OF FACT

4 I.

5 Clifford F. Morris (hereinafter called respondent) is the owner
6 of a large farm located in the flood plain of the Yakima River
7 three miles west of Moxee City in Yakima County. For many years he
8 has planned on an excavation for the purpose of constructing a fish
9 pond. In 1964, he removed a small amount of sand and gravel
10 and used it for the commercial construction by him of a concrete
11 base for a sign removed from the farm. In 1969, he dug test holes
12 to obtain samples of the gravel and in 1970, because of nearby,
planned highway construction project, he mentally determined to take
14 the necessary steps to obtain the required governmental approvals
15 necessary for him to excavate for and sell gravel from a 40 acre
16 portion (hereinafter called site) of his farm. On December 6, 1971
17 he procured a Hydraulics Project Approval from the State Fisheries
18 and Game Departments for the site. One of its conditions was the
19 required construction of a protective dike around the area within
20 which gravel could be removed.

21 On February 1, 1972, he procured a Surface Mining Permit from
22 the Board of Natural Resources. To obtain it, he sought and received,
23 on January 4, 1972, the written recommendation of the Yakima County
24 Planning Director, as follows:

25

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1 "Yakima County has no regulations at the present
2 time which requires a permit for surface mining.
3 The subsequent use of this property is in accord
4 with our plans for the area" (Site Exhibit L).

5 Relying on that statement and reinforced by the fact that the
6 site of the excavation is about 1,000 feet from the most easterly
7 branch of the Yakima River, respondent erroneously believed that a
8 shoreline management permit was not required. However, he discovered
9 that the State Highway Department would not allow the use of his
10 gravel on its highway construction project unless its removal was
11 pursuant to such a permit.

12 II.

13 After the prior publication of the notice required by law,
14 on April 9, 1974, the County granted and issued to respondent a
15 substantial development permit for the "construction and development
16 of a gravel extracting operation including access road" upon the
17 40 acre site described as the NE quarter of the SW quarter of
18 Section 4, Township 12N, Range 19 E.W.M. The site plan which
19 accompanied respondent's application for the shoreline management
20 permit, and which is required by the regulations of the Department
21 of Ecology, describes an excavation area of "approximately 5 acres"
22 within the 40 acre site to a minimum and maximum depth of 15 and 30
23 feet, respectively with 2 to 1 side slopes. The permit contained
24 no general but rather standard conditions usual for all shoreline
25 management permits including the admonition that construction was
26 not authorized for at least 45 days. Nonetheless, within 2 days after
27 its issuance, respondent authorized or permitted the excavation and

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1 removal of the top soil of 3 to 5 acres and thereafter approximately
2 one-half of the gravel within the 5 acre site. Although not relevant
3 to this Board's review of the matter, respondent has been charged with
4 a criminal violation of the Shoreline Management Act.

5 III.

6 On April 12, 1974, the Department of Ecology granted its flood
7 plain permit under the provisions of RCW 86.16 for the site.
8 That permit was specially conditioned to prohibit the construction of
9 any "berms or other earthen works" and stockpiling of excavational
10 materials. The condition is opposite of the condition of the
11 Hydraulic Permit. The site is in the flood fringe, not the floodway,
12 of the Yakima River.

13 On June 12, 1974, the Department of Ecology granted respondent a
14 National Pollutant Discharge Elimination System (NPDES) permit
15 authorizing him to discharge water from his property in accordance
16 with water quality standards therein described and conditioned upon
17 the treatment of waste waters in an "adequately sized settling pond"
18 to be designed, operated and maintained so as to insure compliance with
19 effluent limitations as set forth in the NPDES permit (Exhibit M).
20 That permit contains numerous other detailed and comprehensive
21 special and general restrictive conditions for the settling basin and
22 effluent limitations .

23 IV.

24 The groundwater table is at 6 to 8 feet (Exhibit 7). Respondent's
25 gravel excavation process will take place at or near the same elevation
of the Yakima River and involves "dewatering" of the pit site (the

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1 pumping of groundwater which is at the surface) in order to excavate
2 the aggregate. The groundwater is heavily charged and the soil
3 conditions are gravelly and porous. During the time of "dewatering",
4 there would be a temporary "drawdown" or lowering of the water table
5 of land adjacent to the excavation. Such land, however, would
6 quickly recharge itself. The further away from the site, the less the
7 drawdown. Appellants contended, but did not prove, that the excavation
8 would lower the groundwater table on property to the south of respondent.

9 V.

10 Appellant, Walter C. Brulotte (hereinafter Brulotte) is the
11 owner of a large (550 acres) farm which lays easterly and southerly
12 of respondent's farm and his north line is 600-800 feet south of the
13 site of the gravel excavation. Brulotte's farm is partially cleared
14 for pasture and some portions of it, although utilized by him for cattle
15 grazing, contain a natural growth of trees and brush, especially near the
16 Yakima River. The 40 acre parcels immediately southerly and easterly
17 of the site are used for pastures. The Moxee Drainage ditch runs
18 in a southwesterly direction through his property and some of it is
19 diverted by him for irrigating his land. Some springs are found on
20 the easterly portion of the Brulotte farm. A portion of Brulotte's
21 property has been designated by the Washington State Game Department
22 as a game reserve and it is prolific in birdlife species. Brulotte
23 and great numbers (in excess of 250) of his friends and relatives hunt
24 portions of his farm not designated as a reserve. The function of
25 game reserve is to provide hunting opportunities adjacent thereto.

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1 VI.

2 The noise and activity occasioned by the operation of a gravel
3 pit and access road on respondent's property would be "disturbing" to
4 the nearby wild birdlife, but such would be temporary and would not
5 adversely effect the bird habitat.

6 VII.

7 There are several other existing public and privately owned
8 gravel pits in the floodway plain and floodway of the Yakima River.

9 VIII.

10 The "Moxey Bog", 13 acres of land owned by Nature Conservancy
11 and situated adjacent to a County road, is located one mile distant
12 and almost due south from the site. Several water drainage ditches,
13 containing drainage waters flowing in a southwesterly direction, are
14 located between the site and the Bog. The Bog is fed by springs
15 thereon and is inhabited by a specie of butterfly attracted to it
16 because of the type of violet which grows therein. While the
17 butterfly is rare to Yakima County, it is not considered by a butterfly
18 expert to be rare in the western states. Appellants contended, but
19 did not prove, that respondent's excavation would have a detrimental
20 effect upon the Bog. Respondent's gravel excavation would have no
21 adverse effect upon the Moxey Bog.

22 IX.

23 One of appellants herein, Carolyn Lagergren, although she had
24 orally requested of the County that she be advised of all applications
25 for shoreline management substantial development permits, was not so
26 notified of the instant matter. She did not prove or contend that she

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1 was in any way prejudiced thereby, nor do the regulations of
2 Department of Ecology require such.

3 X.

4 The main stream of the Yakima River and its various subsidiary
5 channels have on past occasions abruptly changed course and the area of
6 the river bottom is interspersed with islands of land. Those abrupt
7 changes have occurred in part as a result of the acts of persons
8 intentionally designed to shift the adjacent river waters from them
9 onto the land of others.

10 The river is now slowly eroding its easterly uplands. Unless
11 man intervenes to contain the river by the construction of a dike
12 (as in proposed by the Corps of Army Engineers), both the property of
13 Brulotte and respondent and others will inevitably be flooded by a
14 change in the course of the river or one of its branches. A 5 acre
15 excavation of the type proposed by respondent will not be the cause of
16 any future course change or flooding of the river.

17 XI.

18 The trucking on the access road of materials from the site
19 creates and causes dust to be airborne to adjacently owned property
20 on which harvestable crops are being grown. Respondent promised, in
21 his letter of March 25, 1974, (Exhibit 8) that the access road would
22 "be watered by a contractor to avoid dust".

23 XII.

24 The "Goals and Policies" portion only of the nine person
25 Citizens Shoreline Advisory Committee of Yakima County was adopted by
26 the Committee in January, 1974. The entire Yakima County Shoreline

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1 Master Program (Exhibit 5) was not adopted by the Citizens Committee
2 until June, 1974.

3 XIII.

4 With respect to "Mining", the policy portion of the Citizens
5 Advisory Committee provides in pertinent part as follows:

6 . . . "Policies:

- 7 1. Sand, gravel, and minerals should be removed
8 from only the least sensitive shoreline areas.
- 9 2. When rock, sand, gravel, and minerals are
10 removed from shoreline areas, adequate
11 protection against sediment and silt
12 production should be provided. If such
13 removal is to occur in a lake, river, or
14 stream bed, a Hydraulics Permit from the
15 Departments of Game and Fisheries is required.
- 16 3. Excavations for the production of sand,
17 gravel and minerals should be done in
18 conformance with the Washington State
19 Surface Mining Act.
- 20 4. Land Reclamation plans should be required
21 of any mining venture proposed within a
22 shoreline area."

23 After the shoreline management permit was granted the site was
24 designated by the Citizens Advisory Committee as "Conservancy".

25 XIV.

26 Although the site plan filed with respondent's application
27 shows the area of the excavation to be a maximum of 5 acres, there
28 are some persons who believe, including at least one County Commissioner,
29 that the shoreline management permit authorized an excavation of the
30 full 40 acres.

31 XV.

32 The planning staff of Yakima County circulated an environmental

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1 work sheet to various interested public agencies (but not the Department
2 of Game) and after a consideration of environmental factors, and the
3 responses to the environmental work sheet, concluded that the
4 action would be minor "with possible significant effects".
5 However, at the April 9, 1974 meeting of the Board of County
6 Commissioners, they adopted a formal resolution which concluded that
7 the instant project would be a "major action with possible significant
8 effects". Notwithstanding such conclusion, they immediately proceeded
9 to grant the shoreline management permit and did not require a
10 detailed impact statement or an assessment statement.

11 XVI.

12 Any Conclusion of Law hereinafter recited which should be
3 deemed a Finding of Fact is hereby adopted as such.

14 From which the Shorelines Hearings Board makes these

15 CONCLUSIONS OF LAW

16 I.

17 Under the provisions of the Shoreline Management Act appellants
18 have the burden of proving the permit to be inconsistent with the
19 policy of the Act, the guidelines of the Department of Ecology, or
20 the Master Program of Yakima County, insofar as can be ascertained.
21 Appellants have not met their burden.

22 II.

23 The permit when read together with the restraints and
24 conditions contained in the various other governmental permits,
25 is not inconsistent with the policy of the Shoreline Management Act,
6 the guidelines of the Department of Ecology, or the Master Program of

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1 Yakima County, insofar as can be ascertained.

2 III.

3 Because we must remand the matter for other reasons and although
4 we believe that, as a matter of law, the site plan confines the
5 excavation to 5 acres of land, it is at least confusing or
6 arguable that the permit, as issued, applies to 40 acres. The permit
7 should therefore be clarified in that regard and should also contain a
8 condition which embodies the time within which the work may lawfully
9 be done under the permit as provided in Department of Ecology's
10 regulations. (See WAC 173-14-060)

11 The permit should state, as a condition, that it must be carried
12 out in accordance with the Flood Control Zone Permit (Exhibit F)
13 and the NPDES Permit (Exhibit M) as issued by the Department of
14 Ecology. Copies of the permits should be physically attached to the
15 shoreline management permit so that any interested person can
16 determine under what conditions respondent may carry on his
17 excavation under the shoreline management permit.

18 IV.

19 Whenever local governments, in granting shoreline management
20 substantial development permits, rely upon and are persuaded by
21 certain oral or written statements or promises of the applicant
22 concerning the manner in which the work under the permit is to be
23 performed or the condition in which the land will be left, then under
24 such circumstances the permit itself should express such matters as
25 conditions thereof. The instant permit should expressly state the
26 means by which dust on the access road must be controlled by respondent.

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V.

The County did not follow the procedures of the State Environmental Policy Act. (SEPA) For that reason the permit must be remanded. When, as here, the decision maker has identified some possible significant environmental impact in a major project action, but has nevertheless concluded that a detailed environmental impact statement is not required, the decision maker must furnish or procure an assessment statement before taking final action on the project. The purpose of that "assessment" statement is to furnish the decision maker with sufficient factual information on environmental effects of the project so as to enable him to determine whether the proposed action does or does not significantly effect the environment. If it does, a full environmental impact statement must then be prepared. If it does not, an environmental impact statement is not required under SEPA. The assessment statement must contain convincing reasons why a major project with "possible significant" environmental effects does not require a detailed statement.

VI.

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From which follows this

ORDER

This matter is remanded to Yakima County for its compliance with SEPA and the reissuance of the shoreline management substantial development permit in the form herein expressed.

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DATED this 3rd day of July, 1974.

SHORELINES HEARINGS BOARD

Walt Woodward
WALT WOODWARD, Chairman

W. A. Gissberg
W. A. GISSBERG, Member

Ralph A. Beswick
RALPH A. BESWICK, Member

Ray Card
RAY CARD, Member

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